Supreme Court, U.S.
FILED
JUL 24 2002

Nos. 01-1521 and 01-1708

In the Supreme Court of the United States

ISLAMIC REPUBLIC OF IRAN, PETITIONER

v.

MCKESSON HBOC, INC., ET AL.

MCKESSON HBOC, INC., ET AL.,
CONDITIONAL CROSS-PETITIONERS

v.

ISLAMIC REPUBLIC OF IRAN

ON PETITION AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE OVERSEAS PRIVATE INVESTMENT CORPORATION IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

DOUGLAS N. LETTER
H. THOMAS BYRON III
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

MARK A. GARFINKEL
General Counsel
Overseas Private Investment Corporation
Washington, D.C. 20527

WILLIAM H. TAFT, IV
Legal Adviser
Department of State
Washington, D.C. 20520

31 pp

QUESTIONS PRESENTED

The petition (No. 01-1521) presents the following questions:

1. Whether the Treaty of Amity, Economic Relations and Consular Rights, June 16, 1957, U.S.-Iran, 8 U.S.T. 899, between the United States and Iran creates a private right of action under United States law for a United States corporation to sue petitioner in a United States court for expropriation.

2. Whether petitioner is immune from suit under the Foreign Sovereign Immunities Act of 1976 (FSIA) because, according to petitioner, the commercial activity at issue did not cause a direct effect in the United States.

3. Whether petitioner is immune from suit under the FSIA because the alleged expropriation was accomplished, in part, through the non-payment of dividends that, according to petitioner, were payable only in Iran.

4. Whether the court of appeals should have directed the district court to enter summary judgment for petitioner.

The conditional cross-petition (No. 01-1708) presents the following additional questions:

5. Whether the court of appeals erred in reversing the entry of summary judgment for cross-petitioner on liability and remanding for further proceedings on one of petitioner's defenses.

6. Whether cross-petitioner was entitled to an award of compound, rather than simple, prejudgment interest.

TABLE OF CONTENTS

	Page
Statement	1
Argument	8
Conclusion	25

TABLE OF AUTHORITIES

Cases:

Alexander v. *Sandoval*, 532 U.S. 275 (2001) 12
Argentine Republic v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) 11
Asakura v. *Seattle*, 265 U.S. 332 (1924) 12
Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) 8
City of Milwaukee v. *Cement Div. Nat'l Gypsum Co.*, 515 U.S. 189 (1995) 22
Correctional Servs. Corp. v. *Malesko*, 122 S. Ct. 515 (2001) 12
Dames & Moore v. *Regan*, 453 U.S. 654 (1981) 3
EEOC v. *Kentucky State Police Dep't*, 80 F.3d 1086 (6th Cir.), cert. denied, 519 U.S. 963 (1996) 23
First English Evangelical Lutheran Church v. *Los Angeles County*, 482 U.S. 307 (1987) 13
Foster v. *Neilson*, 27 U.S. (2 Pet.) 253 (1829) 10
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 8
Islamic Republic of Iran v. *McKesson Corp.*, 516 U.S. 1045 (1996) 5, 9
Islamic Rep. of Iran v. *United States*, 16 Iran-U.S. Cl. Trib. Rep. 285 (1987) 23
President of India v. *La Pintada Compania Navegacion S.A.*, [1984] 1 AC 104 23
Republic of Argentina v. *Weltover, Inc.*, 504 U.S. 607 (1992) 5, 17, 18

Cases—Continued: Page

Rite-Hite Corp. v. *Kelley Co.*, 56 F.3d 1538 (Fed. Cir.), cert. denied, 516 U.S. 867 (1995) 23
Russian Volunteer Fleet v. *United States*, 282 U.S. 481 (1931) 13
Saudi Arabia v. *Nelson*, 507 U.S. 349 (1993) 15, 16
Tel-Oren v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir.), cert. denied, 470 U.S. 1003 (1985) 11
The Scotland, 118 U.S. 507 (1886) 22
Transamerica Mortgage Advisors, Inc. v. *Lewis*, 444 U.S. 11 (1979) 12, 13
United States v. *Percheman*, 32 U.S. (7 Pet.) 51 (1833) 10
Virginia Military Inst. v. *United States*, 508 U.S. 946 (1993) 8
Whitney v. *Robertson*, 124 U.S. 190 (1888) 10

Constitution, treaty and statutes:

U.S. Const. Amend. V 12, 13
Treaty of Amity, Economic Relations and Consular Rights, June 16, 1957, U.S.-Iran, 8 U.S.T. 899 6
Art. III 13
Art. IV 12, 13
Foreign Sovereign Immunities Act of 1976:
28 U.S.C. 1330 4
28 U.S.C. 1602 *et seq.* 4
28 U.S.C. 1603(d) 17
28 U.S.C. 1605(a)(1) 11
28 U.S.C. 1605(a)(2) 4, 5, 7, 16, 17, 18, 19
28 U.S.C. 1605(a)(3) 19
28 U.S.C. 2101 ..... 2, 10
28 U.S.C. 2104 1
28 U.S.C. 516 9
28 U.S.C. 1491 18

Statutes—Continued: Page

22 U.S.C. 2196 2
22 U.S.C. 2197(e) 2
22 U.S.C. 2199(d) 3

Miscellaneous:

James Crawford, *Third Report on State Responsibility*, [2000] 2 Y.B. Int'l L. Comm'n 50, U.N. Doc. A/CN. 4/507/2000/Add.1 23
Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981) 3
Michael S. Knoll, *A Primer on Prejudgment Interest*, 75 Tex. L. Rev. 293 (1996) 23
Restatement (Third) of the Foreign Relations Law of the United States (1987) 10
Robert L. Stern et al., *Supreme Court Practice* (7th ed. 1993) 8
Carlos M. Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695 (1995) 10, 11

In the Supreme Court of the United States

No. 01-1521

ISLAMIC REPUBLIC OF IRAN, PETITIONER

v.

MCKESSON HBOC, INC., ET AL.

No. 01-1708

MCKESSON HBOC, INC., ET AL.,
CONDITIONAL CROSS-PETITIONERS

v.

ISLAMIC REPUBLIC OF IRAN

ON PETITION AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE OVERSEAS PRIVATE INVESTMENT CORPORATION IN OPPOSITION

STATEMENT

1. Respondent Overseas Private Investment Corporation (OPIC) is a federal agency that insures United States businesses against political risk in their investments abroad and also finances overseas business through loans and loan guarantees. See generally 22 U.S.C. 2194. OPIC was created "[t]o mobilize and facilitate the participation of United States private capital and skills in the economic and social develop-

ment of less developed countries and areas, and countries in transition from nonmarket to market economies, thereby complementing the development assistance objectives of the United States." 22 U.S.C. 2191. OPIC is a corporation wholly owned by the United States Government. It functions as an agency of the Executive Branch, independent of any Cabinet Department but "under the policy guidance of the Secretary of State." *Ibid.* OPIC's guaranty and insurance obligations are backed by the full faith and credit of the United States of America, although the agency operates on a self-sustaining basis at no net cost to the taxpayers. See 22 U.S.C. 2191, 2196, 2197(c).

In 1973, OPIC insured a $2.5 million recapitalization investment in a dairy operation in Iran (Pak Dairy), made by respondent McKesson HBOC, Inc. (then known as Foremost-McKesson, Inc.) and its wholly owned subsidiary (collectively McKesson). By 1980, McKesson owned 31% of the outstanding common stock of Pak Dairy, and OPIC insured 64% of that shareholding interest, providing $5.6 million of coverage against expropriation. Between 1980 and 1982, OPIC paid McKesson more than $4 million, in satisfaction of claims for expropriation by Iran of McKesson's investments in Pak Dairy.

By 1979, petitioner, through its agencies and instrumentalities, owned a majority of the shares of Pak Dairy and was thereby able to exercise effective corporate control over Pak Dairy's board of directors.[1] In this suit, McKesson contends that petitioner used that control to exclude McKesson from its role on the board

---

[1] The Iranian agencies and instrumentalities are also named defendants, but they have not appeared or otherwise participated in this case. See Pet. App. 29a n.2, 90a n.4.

and thereby to deprive McKesson of its equity interest in Pak Dairy. McKesson seeks compensation for that unlawful deprivation of its property interest. OPIC has an interest in the suit because it paid insurance claims on a portion of those losses.

2. In 1982, respondents brought this suit against petitioner and certain of its agencies and instrumentalities.[2] At that time, all such claims were subject to a stay and to arbitration before the Iran-United States Claims Tribunal at the Hague. Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981); see *Dames & Moore* v. *Regan*, 453 U.S. 654, 684-685 (1981). The claim was presented to the Tribunal, which ruled that petitioner was liable for the failure of Pak Dairy to pay dividends and other amounts due to McKesson in 1979 and 1980. The Tribunal awarded McKesson $1.4 million, which petitioner paid from the security account established under the Algiers Accords. Pet. App. 3a-4a.

In 1986, the Tribunal concluded that there had not been an expropriation of McKesson's interest in Pak Dairy as of January 19, 1981, the date that established the limits of the Tribunal's jurisdiction. Pet. App. 3a-4a. Accordingly, in 1988, respondents renewed this suit, alleging that the actions of petitioner culminated in a total expropriation sometime after January 19, 1981. Years of further litigation, including three appeals, ensued.

3. In the first interlocutory appeal, decided in 1990, the court of appeals held that petitioner was not entitled to sovereign immunity under the Foreign Sover-

---

[2] OPIC has statutory authority "to represent itself or to contract for representation in all legal and arbitral proceedings." 22 U.S.C. 2199(d). Pursuant to that authority, OPIC was represented in the courts below by the same counsel that represents McKesson.

eign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.* See Pet. App. 125a-157a. The court concluded that the claims in this case come within the commercial activity exception to the FSIA, 28 U.S.C. 1605(a)(2). Pet. App. 149a-151a. The court of appeals remanded the case, directing the district court to conduct further fact-finding concerning the attribution of the conduct of the agency and instrumentality defendants to petitioner. Pet. App. 135a-148a, 153a-156a.

In that first appeal, the court of appeals also specifically held that the allegations in respondents' complaint —that petitioner's commercial activities in Iran had a direct effect in the United States—satisfied the "direct effect" requirement of 28 U.S.C. 1605(a)(2). Pet. App. 151a. The court pointed out that McKesson had alleged that "there was a constant flow of capital, management personnel, engineering data, machinery, equipment, materials and packaging, between the United States and Iran to support the operation of Pak Dairy," which was disrupted by the expropriation. *Ibid.* Those "close commercial ties," the court held, contradicted petitioner's claim that the expropriation of McKesson's interest in Pak Dairy would not have any direct effect in the United States. *Ibid.*

4. Following remand from the first appeal, petitioner pursued a second interlocutory appeal. Pet. App. 158a-174a. In that second appeal, petitioner again disputed whether the FSIA's commercial activity exception, 28 U.S.C. 1605(a)(2), applied to the allegations in the complaint. See Pet. App. 165a-166a. The court of appeals again concluded that activities of petitioner alleged in the complaint had "direct effects" in the

United States and that the commercial activity exception therefore applied. *Id.* at 167a.[3]

The court of appeals acknowledged that its first decision was mistaken insofar as it suggested that the FSIA required a showing that the effects in the United States must be "substantial" and "foreseeable." Pet. App. 166a-167a. This Court's decision in *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607 (1992), had expressly rejected "the suggestion that § 1605(a)(2) contains any unexpressed requirement of 'substantiality' or 'foreseeability,'" in addition to the express statutory requirement that the effects be "direct." Pet. App. 166a (quoting *Weltover*, 504 U.S. at 618). *Weltover*, however, "did not undermine [the court of appeals'] separate determination that these alleged effects were also 'direct.'" *Id.* at 167a. The court of appeals therefore concluded that its earlier decision constituted the law of the case and should not be revisited. *Id.* at 168a. This Court denied petitioner's subsequent petition for a writ of certiorari. *Islamic Republic of Iran* v. *McKesson Corp.*, 516 U.S. 1045 (1996).

5. On remand from the second appeal, the district court resolved the parties' cross-motions for summary judgment. Pet. App. 88a-124a. That decision led to the third appeal, and, in turn, the petition and conditional cross-petition for writ of certiorari that are now before the Court.

a. In 1997, the district court denied petitioner's motion for summary judgment, which was based in part

---

[3] The court of appeals also affirmed the district court's findings, after the remand, that the acts of the agencies and instrumentalities represented on Pak Dairy's board of directors were attributable to petitioner—a question left open in the first appeal. Pet. App. 169a-172a.

on the same immunity arguments petitioner had raised in its prior appeals. Pet. App. 123a-124a. The court granted respondents' motion for partial summary judgment, finding petitioner liable for the expropriation of McKesson's interest in Pak Dairy. The court held that the expropriation had become complete by April 5, 1982, when Pak Dairy's board, for the fourth time, paid dividends to Iranian shareholders but not to McKesson, after taking other actions denying McKesson its rights as a shareholder. *Id.* at 114a-116a. The district court concluded that respondents were entitled to relief based on causes of action provided both by customary international law and by the Treaty of Amity, Economic Relations and Consular Rights Between the United States and Iran, June 16, 1957, U.S.-Iran, 8 U.S.T. 899 [hereinafter Treaty of Amity]. Pet. App. 116a-123a.[4] In a later decision, the district court determined that petitioner and its agencies and instrumentalities were jointly and severally liable for more than $20 million in compensatory damages, of which more than $11 million represented simple pre-judgment interest on the losses suffered by respondents. *Id.* at 27a-85a. The court entered final judgment in that amount. *Id.* at 86a-87a.

b. The court of appeals affirmed in part and reversed in part, remanding the case to the district court with instructions to proceed to trial on petitioner's substantive defense to liability. Pet. App. 1a-19a. The court considered once again petitioner's jurisdictional arguments based on the FSIA, holding for the third time that respondents' claims come within the commercial

---

[4] The district court noted that respondents had also argued that Iranian law provided a cause of action, but the court did not address that question. Pet. App. 116a n.23.

activity exception, 28 U.S.C. 1605(a)(2). Pet. App. 6a-8a.[5]

The court of appeals then considered the district court's grant of summary judgment on liability. The court held that the Treaty of Amity provides respondents with a cause of action under United States law for an expropriation by petitioner. It did not address the district court's alternative holding that customary international law also provides a cause of action. Pet. App. 10a-11a. The court of appeals concluded, however, that petitioner had raised a genuine issue of material fact concerning its defense that McKesson was required to "come to the company" before receiving its dividends. *Id.* at 11a-14a. The court remanded the case for trial on that question. *Id.* at 15a, 19a.

The court of appeals also upheld the district court's determination of damages. Pet. App. 15a-16a. It rejected respondents' claim that the district court should have awarded compound, rather than simple, prejudgment interest. *Id.* at 17a-19a. The court of appeals concluded that, although the district court may have erred in holding that compound interest was never available under international law in such cases, an award of compound interest was not required and the district court did not abuse its discretion by declining to make such an award. *Id.* at 18a-19a.

The court of appeals denied rehearing and rehearing en banc, modifying the original opinion in part. Pet. App. 20a-24a. Petitioner then sought review in this

---

[5] The court also considered Iran's argument that OPIC's claim must be resolved by binding inter-governmental arbitration, pursuant to an international agreement between the United States and Iran. The court held that, even though that agreement might bar OPIC from proceeding, it would have no effect on McKesson's independent claims for the same amounts. Pet. App. 8a-9a.

Court, and McKesson filed a conditional cross-petition for certiorari.

ARGUMENT

The decision of the court of appeals is interlocutory and does not conflict with any decision of this Court or of any court of appeals. The Court should allow the remand to run its course, followed by further appellate review, before deciding whether any of the issues that parties have raised would ultimately warrant this Court's review.

1. This Court's customary practice is to "await final judgment in the lower courts before exercising its certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of certiorari). See, *e.g.*, *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (interlocutory character of a case "of itself alone furnishe[s] sufficient ground for the denial" of review); *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 196 (7th ed. 1993). There is no reason for the Court to depart from its normal practice in this case.

Petitioner prevailed in significant part below. The court of appeals reversed the district court's grant of summary judgment for respondents and remanded for trial on petitioner's merits defense. The questions presented in the petition (and the second question presented in the cross-petition) will be moot if judgment ultimately is entered in favor of petitioner in the further proceedings ordered by the court of appeals.

Although petitioner raises a claim of foreign sovereign immunity (Pet. 14-20; see Pet. 21-24), that factor does not change the calculus. A claim of foreign sovereign immunity does include immunity from suit and not merely from judgment, and a denial of an assertion of foreign sovereign immunity therefore may, in an appropriate case, warrant review by this Court before final judgment. This, however, is not such a case. The court of appeals has now reviewed the applicability of the FSIA's commercial activity exception to this case three times, and this Court denied an earlier petition for certiorari in this case raising the same question under the FSIA nearly six years ago. 516 U.S. 1045 (1996). Petitioner has litigated this case on the merits for nearly twenty years, and all that remains is a trial on a narrow defense that petitioner itself has raised, and that may well eliminate any occasion for review of the case by this Court. In these circumstances, the additional burden of that trial is incrementally quite small, and does not justify interlocutory review.

2. Petitioner contends (Pet. 9-14) that the court of appeals (like the district court) misconstrued the Treaty of Amity. As explained below, petitioner is correct that the Treaty of Amity does not provide a cause of action under United States law for a United States national to sue a foreign sovereign in federal court for expropriation. Although the court of appeals did not properly evaluate that novel issue, its decision does not warrant review under the circumstances presented here.[6]

---

[6] OPIC's position in this Court, which departs from the arguments pressed jointly by OPIC and the private respondents in the courts below, represents the position of the United States Government. See 28 U.S.C. 518 (Attorney General and Solicitor General

a. The court of appeals' conclusion that the Treaty of Amity provides a cause of action because it is "self-executing" (Pet. App. 10a) conflates two separate inquiries. "Whether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies." Restatement (Third) of the Foreign Relations Law of the United States § 111, cmt. h. (1987). The creation of a private right of action "is analytically distinct from the 'self-execution' concept." Carlos M. Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695, 721 (1995).

As this Court explained in *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), a treaty is self-executing "whenever it operates of itself without the aid of any legislative provision." But that means only that the treaty is "regarded in courts of justice as equivalent to an act of the legislature." *Ibid.*; see, *e.g.*, *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888) ("If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment."). Like an Act of Congress, a treaty may establish legal standards or rules of decision in litigation without itself creating a private right of action. And like an Act of Congress, a self-executing treaty that speaks in terms of individual rights may well create rights that are enforceable by courts in actions that are authorized by or brought under other sources of law.[7]

---

will conduct suits in the Supreme Court in which the United States is interested); cf. 22 U.S.C. 2191 (OPIC functions under policy guidance of Secretary of State).

[7] For example, the cause of action in *Foster* (and in *United States* v. *Percheman*, 32 U.S. (7 Pet.) 51 (1833), which involved the same treaty) was a common-law claim for ejectment. Likewise,

The Court's decision in *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), illustrates the point. The Court there ruled that the respondents could not sue Argentina for alleged wrongs, explaining that the treaties on which the respondents relied "only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs. They do not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts." *Id.* at 442 (footnote omitted). Thus, even if those treaties were self-executing, they did not confer a private cause of action, and the Court held that they therefore did not constitute an express waiver of sovereign immunity under 28 U.S.C. 1605(a)(1).[8]

b. The Treaty of Amity's prohibition against expropriation is self-executing, in the sense that it was intended to establish substantive legal standards without the need for implementing legislation. It states that "[p]roperty of nationals and companies of" one state party to the Treaty "shall not be taken [by the other] except for a public purpose, nor shall it be taken with-

---

treaty rights may be raised as a defense in a suit brought under another source of law. See, *e.g.*, Vázquez, *supra*, 89 Am. J. Int'l L. at 721.

[8] The court of appeals' reliance (Pet. App. 10a) on *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985), is misplaced. The concurring judge correctly observed that a non-self-executing treaty cannot confer a private right of action, but the converse is not necessarily true: A treaty that *is* self-executing may or may not confer a private right of action. There was no occasion for the concurring judge to consider that question, and his statement equating self-execution with the creation of private rights of action was accordingly dicta. See, *e.g.*, Vázquez, *supra*, 89 Am. J. Int'l L. at 720-721.

out the prompt payment of just compensation." Treaty of Amity, art. IV, para. 2. That standard is effective of its own force, and imposes a legal obligation on the governments of Iran and the United States. Accord *Asakura* v. *Seattle*, 265 U.S. 332, 341 (1924) (provision of an earlier Treaty of Commerce and Navigation between the United States and Japan "operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts").

The Treaty itself, however, does not create a cause of action for United States citizens to sue Iran in United States courts. By its terms, the Treaty says nothing about private rights of action to enforce its substantive provisions. Thus, the Treaty can create such a cause of action only by implication. In the analogous context of statutes, this Court has exercised great circumspection in recognizing causes of action through that means. See, *e.g.*, *Alexander* v. *Sandoval*, 532 U.S. 275, 285-287 (2001); see also *Correctional Servs. Corp.* v. *Malesko*, 122 S. Ct. 515, 519 n.3 (2001) (noting that this Court has "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one"); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 24 (1979) ("The dispositive question remains whether Congress intended to create any such remedy.").

The United States does not interpret the Treaty of Amity to create a private right of action as a matter of United States law for a United States citizen to sue Iran in the courts of this country. The Treaty establishes legal standards and obligations that are designed to protect the nationals (including corporations) of one state party in the territory of the other. Thus, the Treaty prohibits the uncompensated taking of "[p]rop-

erty of nationals and companies of either High Contracting Party * * * within the territories of the other High Contracting Party." Treaty of Amity, art. IV, para. 2. Equally significant, it refers to "access to courts of justice and administrative agencies" by the "[n]ationals and companies of either High Contracting Party * * * within the territories of the other High Contracting Party." *Id.*, art. III, para. 2. But the Treaty does not confer a right of access to the courts of justice by the nationals and companies of one High Contracting Party to that Party's *own* courts, whether to bring an action against the other party or for any other purpose. It therefore does not itself create, expressly or by implication, a cause of action allowing a United States national to bring an action against Iran in a United States court for Iran's expropriation of the United States national's property.[9]

The court of appeals' contrary conclusion is inconsistent with this Court's circumspection concerning implied private rights of action and with the understanding that Congress defines what causes of action are available in United States courts. See *Transamerica*, 444 U.S. at 24. Because the treaty is focused

---

[9] This case does not present the separate question whether the Treaty of Amity should be read to create an implied private right of action for Iranian nationals or companies to sue the United States or other government actors in this country (see Pet. 11; Br. in Opp. 10-11). In any event, the standards applicable to the United States and the States under the Fifth Amendment of the Constitution satisfy the substantive standards of the treaty, and ample remedies exist under United States law for foreign nationals, as for United States citizens, to bring takings claims against the government. See 28 U.S.C. 1491; *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481 (1931); see also *First English Evangelical Lutheran Church* v. *Los Angeles County*, 482 U.S. 304 (1987).

on a host government's treatment of aliens, it would be particularly odd to infer a cause of action for United States nationals to sue a foreign government in United States courts. There is similarly no reason to think that, in negotiating the Treaty, the United States anticipated that the Treaty could be invoked to create a cause of action allowing Iranian nationals to sue the United States in the courts of Iran. The courts should not infer the creation of reciprocal rights by which United States nationals could sue Iran in the courts of this country.

The court of appeals' interpretation would be detrimental to the broader foreign relations interests of the United States. The United States is a party to numerous Friendship, Commerce, and Navigation (FCN) treaties. If United States courts conclude that FCN treaties generally should be understood to confer private rights of action on United States nationals to sue a treaty partner in federal court in the United States, it is to be anticipated that the courts of this Nation's treaty partners could reach a similar conclusion, and the United States Government could be subject to a variety of new suits in foreign courts (including Iranian courts) by foreign nationals.

c. Although the court of appeals erred in construing the Treaty of Amity, that error does not warrant review at this time. As McKesson points out (Br. in Opp. 8-9), the court of appeals did not address, and petitioner has not sought review of, any alternative basis for respondents' claims. Respondents' complaint identified at least three alternative sources for the cause of action here—customary international law, the Treaty of Amity, and other applicable law, including in particular Iranian law. See McKesson Lodging L169 - L176. The district court held that both the Treaty of

Amity and customary international law provide a cause of action sufficient to sustain this suit. See Pet. App. 116a-123a. The court of appeals did not address the district court's alternative conclusion that customary international law provides a cause of action. Neither court below addressed any other possible source of law, including Iranian law.[10]

As a result of the remand ordered by the court of appeals, the district court and court of appeals will have an opportunity to consider further those possible alternative sources of a cause of action, as well as to consider the position of the United States, set forth in this brief, that the Treaty of Amity does not create a private right of action. If judgment is ultimately entered against petitioner at the conclusion of further proceedings, the Court can then decide whether to grant review to consider the existence of a cause of action under each of those various sources of law to the extent they remain in the case.

3. Petitioner reasserts (Pet. 14-17) its claim of foreign sovereign immunity, contending that this Court's decision in *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993), requires that the "act" of a foreign sovereign on which

---

[10] For reasons similar to those set forth in the text concerning the Treaty of Amity, even more difficult questions are raised by the proposition that an implied right of action may be recognized under customary international law in the absence of an Act of Congress that codifies customary international law and thereby furnishes at least some statutory basis for a cause of action under federal law in United States courts. Nor have the contours of any cause of action under Iranian law been fully developed below. Because the court of appeals did not reach those issues, this Court does not have the benefit of that court's analysis of those questions. And because those alternative bases for a cause of action are not before the Court, we do not address them further here.

jurisdiction is based, for purposes of 28 U.S.C. 1605(a)(2), must also form an element of the cause of action. That argument, which rests on a misapprehension of both *Nelson* and respondents' claims in this case, is incorrect.

Nelson held that a plaintiff cannot obtain jurisdiction under the FSIA's commercial activity exception, 28 U.S.C. 1605(a)(2), to sue on a cause of action that is itself based entirely on a sovereign's non-commercial activity. 507 U.S. at 356-358. To determine whether the claim was "based upon" the act giving rise to jurisdiction, the Court analyzed whether the jurisdictional acts were among the principal elements of the cause of action. *Id.* at 357. Petitioner mistakenly interprets *Nelson* to require that every element of the cause of action must also be an act that confers jurisdiction under Section 1605(a)(2). But this Court expressly rejected that notion. See *Nelson*, 507 U.S. at 358 n.4. Moreover, there would have been no occasion for such a conclusion in *Nelson* because the Court concluded that the jurisdictional commercial activities in that case formed *no* basis for the cause of action. *Nelson* is satisfied here if commercial activity forms the central basis of the cause of action.

Contrary to petitioner's characterizations, this is a claim for expropriation, not merely for "the cut-off of commercial contacts" or for "the non-payment of dividends." Pet. 16. As the court of appeals recognized, respondents alleged the expropriation took place when petitioner, "acting through its various co-defendants on Pak Dairy's Board of Directors, used its majority position to lock [McKesson] out of the management of the company and deny [McKesson] its share of the company's earnings in the form of dividends." Pet. App. 149a (quoting district court); see also *id.* at 7a

(describing the commercial activity as "freezing-out American corporations in their ownership of Pak Dairy") (quoting *id.* at 152a). The specific acts are laid out in the complaint (McKesson Lodging L169 - L176) and affidavits (see, *e.g.*, *id.* at L31 - L41). Thus, the theory of this suit is that the repeated failure to pay dividends worked in combination with other actions (in particular, as the district court found, the exclusion of McKesson from any voice in Pak Dairy's decisions and the cutoff of contacts with McKesson) to demonstrate that the expropriation was complete. See Pet. App. 7a-8a, 115a. And, as we explain below, the court of appeals concluded that those actions resulted in direct effects felt in the United States (the interruption of the "constant flow of capital, management personnel, engineering data, machinery, equipment, materials and packaging, between the United States and Iran"). *Id.* at 167a (quoting *id.* at 151a). That conclusion presents no conflict with *Nelson*.[11]

4. Petitioner also argues (Pet. 17-20) that, under this Court's ruling in *Republic of Argentina* v. *Weltover, Inc.* 504 U.S. 607 (1992), the commercial activity exception applies only if a specific payment or performance is required to be made in the United States. *Weltover* imposes no such rule. *Weltover* sustained the exercise of jurisdiction under 28 U.S.C. 1605(a)(2) because the foreign sovereign there was obliged to make interest payments on bonds in New York. 504 U.S. at 619. In that case, "the plaintiffs [were] all foreign corporations

---

[11] There is no merit to petitioner's effort to distinguish between the statutory term "act" and the court of appeals' reference to "commercial activity." Pet. 16. The FSIA itself refutes any such distinction, defining a "commercial activity" to "mean[] either a regular course of commercial conduct or a particular commercial transaction *or act*." 28 U.S.C. 1603(d) (emphasis added).

with no other connections to the United States" who nevertheless chose to designate New York as the place for payment. *Id.* at 618-619. The Court ruled that this choice was sufficient to satisfy the "direct effect" requirement. *Ibid.* The Court did not rule out the possibility that other types of activities could establish a "direct effect" in the United States.

In this case, petitioner's disruption of a United States' corporation's investment in and relationship with Pak Dairy brought to a halt the "constant flow of capital, management personnel, engineering data, machinery, equipment, materials and packaging, between the United States and Iran to support the operation of Pak Dairy." Pet. App. 167a; *id.* at 151a. The court of appeals ruled, on the facts before it, that this "constant flow * * * between the United States and Iran"—like the obligation to deliver money to a New York bank in *Weltover*—established a sufficient connection with the United States that the effects of its disruption were plainly felt in this country, within the meaning of 28 U.S.C. 1605(a)(2).

The question whether the nature of a transnational commercial relationship is sufficient to create a "direct effect" is necessarily a fact-specific one. The court of appeals' resolution of that question in this case does not conflict with *Weltover* or with any of the lower-court decisions cited by petitioner (Pet. 18-19 nn.14-16) and accordingly does not warrant review by this Court.[12]

---

[12] This case does not present the question whether Section 1605(a)(2)'s "direct effect" standard would be satisfied by the mere non-payment of dividends. As the court of appeals explained, the effects of the expropriation here were much more substantial. Furthermore, the court of appeals' decision quite properly does not suggest that the FSIA's commercial activity exception offers a vehicle for challenging expropriations that are undertaken by

5. Finally, petitioner contends that the court of appeals should have directed the entry of summary judgment in petitioner's favor, rather than merely reversing the grant of summary judgment to respondents and remanding for trial on petitioner's substantive defense. Petitioner provides no sound reason for this Court to exercise its discretionary jurisdiction on certiorari to resolve such a fact-bound, interlocutory question.

a. Petitioner first argues (Pet. 20-24) that it was entitled to summary judgment on the ground that there was no "direct effect" in the United States within the meaning of the FSIA's commercial activity exception. That argument merely restates petitioner's mistaken objections to the application of the FSIA to the facts of this case. See Pet. 22-24 (citing *Nelson*); Pet. 24 ("if Iran's interpretation of *Weltover* and its progeny is correct, Iran was therefore entitled to summary judgment"). It does not provide a separate basis for review. Petitioner's legal argument that the decision below conflicts with *Nelson* and *Weltover* is incorrect for the

---

sovereign acts rather than through commercial means. As the FSIA recognizes, the commercial activity exception is distinct from the exception for situations involving a sovereign act "in which rights in property [are] taken in violation of international law." 28 U.S.C. 1605(a)(3). This case is unusual because foreign states normally do not effectuate an expropriation through commercial means. The court of appeals concluded that nothing in Section 1605(a)(3) precludes a finding, in an appropriate case, that an expropriation undertaken by commercial means might also come within the commercial activity exception of Section 1605(a)(2). See Pet. App. 150a n.15; see also *id.* at 110a n.17 (district court's observation that "McKesson's claims are akin to a corporate dispute between majority and minority shareholders"). That conclusion does not conflict with any decision of another court of appeals.

reasons previously explained. Respondents do not seek relief for the "cut-off of commercial contacts" (Pet. 22) or for non-payment of dividends (Pet. 23), standing alone. Instead, they assert that petitioner undertook a full expropriation through commercial means. See Pet. App. 90a-91a (cause of action for expropriation accrues when deprivation of property is irreversible).

b. Petitioner also asserts (Pet. 24-25) that the court of appeals should have directed summary judgment in its favor on the substantive defense that petitioner raised, instead of remanding for trial on that question. That question involves the application of settled law respecting summary judgment to the particular facts of this case. Petitioner's fact-bound claim does not warrant this Court's review.

The parties disputed whether Pak Dairy had imposed a requirement that shareholders or their representatives physically appear to collect their dividends—a "come to the company" requirement. The court of appeals rejected petitioner's broadest argument—that Iranian law imposed such a requirement on all dividend distributions by any Iranian corporation—but held that "Iranian law permitted Pak Dairy's board of directors to adopt such a binding requirement." Pet. App. 12a. The court then concluded that petitioner's affidavits were sufficient to demonstrate a disputed issue of material fact (though not sufficient to compel summary judgment in petitioner's favor) over whether "Pak Dairy exercised its discretion to implement a 'come to the company' requirement." *Id.* at 12a-13a.

The court of appeals acknowledged respondents' objections to the "self-serving, vague, and uncorroborated" nature of the affidavits on which petitioner relied. Pet. App. 13a. Those objections demonstrated the disputed factual question at the center of peti-

tioner's defense—what Pak Dairy's board of directors had actually decided. The court recognized that the question whether summary judgment was properly granted to respondents was a close one. *Id.* at 11a. It ultimately held that petitioner's affidavits were "sufficient to *preclude* summary judgment," but only "in view of the generous reading we owe the opposing party's evidence at this stage." *Id.* at 13a-14a (emphasis added).

Just as the court of appeals concluded that summary judgment in favor of respondents was inappropriate, summary judgment in favor of petitioner would have been inappropriate as well. Respondents raised factual objections to petitioner's "come to the company" defense. The district court found that it would have been futile for McKesson to attempt to comply with a requirement that shareholders appear in Iran, even if such a requirement existed. Pet. App. 14a, 111a-112a. After reviewing the summary judgment evidence on the question of futility, the court of appeals concluded that that question also posed unresolved disputes of material fact. *Id.* at 14a-15a.

6. McKesson's conditional cross-petition urges that, if the Court grants the petition for a writ of certiorari, it should also grant review on two additional questions. Although neither of those questions in the conditional cross-petition warrants review in its own right at this stage of the proceedings, each may warrant review if the Court grants the petition.

a. McKesson urges (Cross-Pet. 9-23), as Question 1 of the cross-petition, that it was entitled to summary judgment on liability, notwithstanding petitioner's defenses. That argument is essentially the obverse of petitioner's contention, in Question 4 of its petition, that petitioner was entitled to summary judgment.

Whether viewed from petitioner's or McKesson's perspective, the basic issue—whether the court of appeals properly applied settled standards for granting summary judgment to the facts of this case—does not warrant this Court's review. The court of appeals' application of law to the facts does not present any issue worthy of this Court's determination. Nevertheless, if the Court were to grant review of Question 4 of the petition, it should also grant review of Question 1 of the cross-petition. Because the questions are essentially the obverse of one another, if the Court were to grant one, it should also grant the other.

b. McKesson also urges (Cross-Pet. 23-29) that, if the Court grants the petition, it should also review the court of appeals' determination that the district court did not abuse its discretion in awarding simple, rather than compound, prejudgment interest on the damage award. Pet. App. 17a-19a. That issue would not normally warrant this Court's review. Like the rulings that petitioner challenges, the court's prejudgment interest ruling is interlocutory and, in any event, does not conflict with any decision of this Court or any other court of appeals. Furthermore, the court of appeals' fact-specific determination that the district court acted within its discretion in awarding simple interest does not present an issue of sufficient importance to justify this Court's review.

This Court has recognized that an award of prejudgment interest ordinarily "rests very much in the discretion of the tribunal which has to pass upon the subject, whether it be a court or a jury," *City of Milwaukee* v. *Cement Div. Nat'l Gypsum Co.*, 515 U.S. 189, 196 (1995) (quoting *The Scotland*, 118 U.S. 507, 518-519 (1886))—subject, of course, to whatever limitations are imposed on the exercise of that discretion by

applicable laws.[13] See Pet. App. 19a. As a general matter, "the decision whether to award compound or simple interest is in the trial court's discretion." *EEOC* v. *Kentucky State Police Dep't*, 80 F.3d 1086, 1098 (6th Cir.), cert. denied, 519 U.S. 963 (1996); see, *e.g.*, *Rite-Hite Corp.* v. *Kelley Co.*, 56 F.3d 1538, 1555 (Fed. Cir.), cert. denied, 516 U.S. 867 (1995) (upholding award of simple rather than compound interest). See Pet. App. 18a-19a. There are no compelling grounds for concluding that the district court abused its discretion here.[14]

---

[13] Similarly, the Iran-United States Claims Tribunal has held that in its proceedings, "[t]he determination of the applicable principles of law in any given case, and consequently the question of whether an award of interest is appropriate, must rest with the [Tribunal] Chamber concerned," relating as it does "to the exercise by the Chambers of the discretion accorded to them in deciding each particular case." *Islamic Rep. of Iran* v. *United States*, 16 Iran-U.S. Cl. Trib. Rep. 285, 290 (1987).

[14] McKesson argues that there is a presumption in favor of compound interest. No such presumption appears, however, in the rules of most States, foreign legal systems, and international law. Indeed, a considerable number of legal systems and international law authorities proscribe or sharply limit the use of compound interest and limit prejudgment interest to simple rates. See, *e.g.*, Michael S. Knoll, *A Primer on Prejudgment Interest*, 75 Tex. L. Rev. 293, 306-307 (1996) (urging change from "[t]he traditional, common-law rule * * * that prejudgment interest is not compounded," which remains the "majority rule" among States); *id.* at 306 n.76 (noting that prohibition on compound interest is the rule in the United Kingdom, citing *President of India* v. *La Pintada Compania Navegacion S.A.*, [1984] 1 A.C. 104); Pet. App. 18a ("compound interest is not generally awarded under international law or by international tribunals") (quoting James Crawford, *Third Report on State Responsibility*, [2000] 2 Y.B. Int'l L. Comm. 50 U.N. Doc. A/CN.4/507/2000/Add.1).

Nevertheless, if the Court were to grant the petition, it may wish to grant review of Question 2 of the cross-petition as well. If the Court grants the petition on Question 1, concerning whether the Treaty of Amity creates a private cause of action in the circumstances of this case, resolution of the substantive source of law for any cause of action available to respondents in this case —the Treaty, customary international law, or Iranian law—could have a bearing on the question of the award of simple or compound interest under that particular source of law. Similarly, if the Court decides to undertake what would necessarily be a fact-intensive review of other aspects of the case, then it may find it beneficial to preserve the option of addressing all of the outstanding issues. And insofar as the Court's decision might alter the underlying judgment, the Court may wish to preserve the option of directing the district court to reevaluate its exercise of discretion in awarding prejudgment simple interest in light of any changed circumstances that the Court's decision might provide.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari in No. 01-1521 should be denied. However, if the Court grants the petition in whole or in part, then it should also grant review on Question 2 of the conditional cross-petition for a writ of certiorari in No. 01-1708. If the Court grants review on Question 4 of the petition, it should grant review on Question 1 of the conditional cross-petition.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

DOUGLAS N. LETTER
H. THOMAS BYRON III
Attorneys

MARK A. GARFINKEL
General Counsel
Overseas Private Investment Corporation

WILLIAM H. TAFT, IV
Legal Adviser
Department of State

JULY 2002